

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO3-1229

MICHAEL L. ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON NUMEROUS ISSUES INVOLVING ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In his amended motion for postconviction relief brought pursuant to Fla. R. Crim. P. 3.851, Mr. Robinson made several claims involving ineffective assistance of counsel. These claims were denied without an evidentiary hearing. In his brief, Mr. Robinson argued that the lower court erred in summarily denying these claims.

As to Mr. Robinson's claims that trial counsel failed to adequately investigate and present available mitigation and to secure competent mental health assistance on behalf of his client, the State argues that no evidentiary hearing was warranted because the allegations were insufficiently pled and involved only "duplicative or cumulative information" (Answer Brief at 40).¹ For this proposition, the State relies on three cases: *Gudinas v. State*, 816 So. 2d 1095 (Fla. 2002), *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989), and *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002), *cert. denied*, 538 U.S. 926 (2003) (Answer Brief at 40-41).

¹The State repeatedly argues that the allegations were insufficiently pled (Answer Brief at 40, 44). The lower court made no such finding.

The portions of these opinions relied on by the State are inapposite to Mr. Robinson's case. *Gudinas* is the most clearly distinguishable. In that case, the Court agreed with the lower court's conclusion, *after an evidentiary hearing had been conducted*, that the mitigation adduced at the hearing was similar to that presented at the penalty phase. *Gudinas*, 816 So. 2d at 1105-06. Here, of course, no evidentiary hearing was granted as to Mr. Robinson's allegations. In *Kennedy*, this Court did affirm a Rule 3.850 motion without an evidentiary hearing; however, the Court did not reject the claim because of any pleading deficiencies as the State alleges in Mr. Robinson's case. Rather, the Court affirmed the summary denial because it found the allegations to be conclusory. *Kennedy*, 547 So. 2d at 913. In Mr. Robinson's case, he made specific allegations even including names of witnesses he wished to present at an evidentiary hearing. Finally, the portion of the decision in *Lawrence* relied on by the State addressed a summary denial on allegations of trial counsel's failure to object. *Lawrence*, 831 So. 2d at 133. This is not at all like the allegations presented in Claims IV and V of Mr. Robinson's motion. Notably, in *Lawrence*, the lower court did hold an evidentiary hearing on the penalty phase ineffective assistance of counsel claim. Thus, the cases relied on by the State do not support its defense of the lower court's refusal to grant an evidentiary hearing on these claims.

The State argues that Mr. Robinson “faults the trial judge for ‘focusing’ on the prejudice prong” (Answer Brief at 42). This is a misrepresentation of Mr. Robinson’s argument. Mr. Robinson did not “fault” the lower court for “focusing” on the prejudice prong. Rather, Mr. Robinson’s argument reveals that his argument was that the lower court’s prejudice analysis was constitutionally inadequate under prevailing Supreme Court law. *See* Initial Brief at 45-46. As he explained, and the State does not refute, the lower court focused on the fact that the additional mitigation alleged by Mr. Robinson would not “have resulted in a different sentence” (PCR550). This is not a proper prejudice analysis. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003); *Williams v. Taylor*, 120 S. Ct. 1495 (2000). The State challenges Mr. Robinson’s reference to *Wiggins*, but does not discuss *Wiggins* in the context of Mr. Robinson’s argument that the lower court’s prejudice analysis is faulty (Answer Brief at 44-45). The State does not mention *Williams* at all.

In Claim XI of his Rule 3.851 motion, Mr. Robinson alleged that, after this Court vacated his death sentence and remanded for a new sentencing phase, trial counsel failed to assert Mr. Robinson’s right to have his sentencing conducted before a jury, not just the court (PCR239-40). The State defends the lower court’s order denying this claim on its merits, arguing that it is supported by “competent,

substantial evidence” (Answer Brief at 46). This is not the standard for reviewing Mr. Robinson’s claim. This Court’s review both as to the sufficiency of the allegations warranting an evidentiary hearing as well as the actual constitutional issues presented under the Sixth Amendment are reviewed by this Court *de novo*. See *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999); *McLin v. State*, 827 So. 2d 948 (Fla. 2002). Thus, the Court does not simply defer to the lower court’s conclusion if supported by competent and substantial evidence; rather, the Court reviews, in a *de novo* fashion, the allegations made by Mr. Robinson both for legal sufficiency and to assess whether they are conclusively refuted by the record. If legally sufficient and not conclusively refuted by the record, an evidentiary hearing is required.

The State argues that the allegations in Claim XI are procedurally barred and that Mr. Robinson is seeking to “avoid” the bar by raising the claim as one involving ineffective assistance of counsel (Answer Brief at 47). The State is incorrect. As this Court has explained:

The trial court concluded that this claim was barred because it either was, or could have been, raised on direct appeal. This was error. Whereas the main question on direct appeal is whether the trial court erred, the main question on a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and—of necessity—have different remedies: A claim of trial court error generally can be raised

on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a reule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2002). Under this analysis, Mr.

Robinson's claim is not procedurally barred.²

Rather than addressing Mr. Robinson's argument, the State simply maintains that Mr. Robinson's real argument is that this Court's decision to remand for judge resentencing was incorrect, and that the trial court complied with this Court's decision in Mr. Robinson's prior appeal (Answer Brief at 48).³ This is not a

²The State notes that "this issue" has been raised in Mr. Robinson's petition for habeas corpus (Answer Brief at 47). This is not entirely accurate. In his Rule 3.851 motion, Mr. Robinson alleged trial counsel's ineffectiveness for failing to assert Mr. Robinson's right to a jury resentencing. In his habeas petition, Mr. Robinson alleged that appellate counsel was prejudicially deficient in failing to argue that Mr. Robinson was entitled to a jury resentencing, not just a judge-only proceeding. Indeed, in the habeas proceeding, the State has argued that appellate counsel was not ineffective "for failing to raise an issue which was not raised at the trial level" (State's Response, *Robinson v. Crosby*, No. SC04-772, at 12-13).

³The State seems to be implying that trial counsel may have had a strategic reason not to assert Mr. Robinson's desire for a jury sentencing proceeding in that it would have been futile given this Court's decision remanding for a judge-sentencing only. Whether counsel had this strategic decision cannot be ascertained without an evidentiary hearing. See *Patton v. State*, 784 So. 2d 380, 387 (Fla. 2002).

correct representation of Mr. Robinson's position. While Mr. Robinson does assert in his habeas petition that this Court's decision was not correct, in his Rule 3.851 motion, he alleged that counsel had the affirmative obligation to object and request a jury sentencing. The State does not dispute that this Court remanded for a full and complete penalty phase, not just a reweighing by the lower court, and that thus the full panoply of rights under the Sixth Amendment attached to the proceedings. Because Mr. Robinson's allegations make out a legally sufficient claim of ineffective assistance of counsel, an evidentiary hearing is warranted and the lower court's order should be reversed.

As to the remaining areas of ineffective assistance of counsel argued in Mr. Robinson's brief, he rests on the arguments and authorities cited therein, and submits that the lower court's summary denial of these arguments should be reversed and these claims be remanded for evidentiary resolution.⁴

⁴Mr. Robinson does point out one matter. Citing *Shere v. State*, 742 So. 2d 215, 218 n.6 (Fla. 1999), the State argues that Mr. Robinson's argument as to counsel's failure to object to constitutional error is "insufficiently pled" (Answer Brief at 51). The State overlooks that Mr. Robinson has complied with the procedure set forth in *Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000), in order to preserve these claims.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. ROBINSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO INVESTIGATE AND ACCURATELY AND PROPERLY WITHDRAW HIS PLEA.

In Claim III of his amended motion for postconviction relief, Mr. Robinson alleged that his trial counsel rendered prejudicially deficient performance due to his failure to adequately investigate and properly move to withdraw Mr. Robinson's previously-entered plea of guilty. The lower court granted an evidentiary hearing on this issue, and ultimately denied relief (PCR543-47). Because this claim involves mixed questions of law and fact, this Court's standard of review is *de novo*. See *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999); *McLin v. State*, 827 So. 2d 948 (Fla. 2002).

In response to Mr. Robinson's argument, the State first dutifully reproduces the entirety of the lower court's order (Answer Brief at 54-57), then discusses portions of the direct appeal record, including the plea proceedings (Answer Brief at 57-65). Next, the State reproduces portions of this Court's direct appeal opinion (Answer Brief at 65-66). Finally, nearly a dozen pages into its argument, the State addresses the actual claim raised by Mr. Robinson on which the lower court

granted an evidentiary hearing:

The current attempt to frame this claim as an ineffective assistance of counsel claim fails. This Court found that the plea was voluntarily entered; therefore, any attempt to withdraw the plea would be futile since, as this Court put it [on direct appeal], “[Robinson] merely changed his mind and no longer wishes to die.” [] This is a classic example of raising a claim under the guise of ineffective assistance of counsel after the claim was rejected on the merits on direct appeal. *Medina v. State*, 573 So. 2d 293 (Fla. 1990). Robinson can show no deficient performance or prejudice. *Strickland*.

(Answer Brief at 66-67).

This is the extent of the State’s argument in response to Mr. Robinson’s brief and in purported defense of the lower court’s order. The State’s brief is deficient in failing to address the arguments raised by Mr. Robinson on appeal. The State makes no mention of the evidence adduced at the hearing and how this Court should, after conducting *de novo* review, affirm that order. Nor does the State discuss the applicable legal standards. Mr. Robinson’s arguments must therefore remain unrefuted before the Court. It is difficult to submit a reply to an Answer Brief which makes no arguments.⁵ The only “argument” than can be

⁵ See *Jones v. Nagle*, 349 F. 3d 1305, 1307 (11th Cir. 2003) (“Because the State did not dispute Jones’s equitable tolling argument in the district court, the state has waived its opportunity to address this argument now”); *Lamb v. Jernigan*, 683 F. 2d 1332, 1335 n.1 (11th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1982) (discussing state’s waiver of exhaustion doctrine by failing to raise it at the appropriate juncture); *Thompson v. Wainwright*, 714 F. 2d 1495, 1501 (11th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984) (same); *Hopkins v. Jarvis*, 648 F. 2d 981,

discerned from the State's brief is that perhaps the State is arguing that the court should not have granted an evidentiary hearing on this claim because it was refuted by the record. However, the lower court *did* grant an evidentiary hearing on this claim. The State has not cross-appealed the lower court's decision to grant a hearing. *Compare State v. Salmon*, 636 So. 2d 16 (Fla. 1994). Thus, the State's apparent displeasure with the granting of an evidentiary hearing is waived and defaulted. *See Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993) (procedural default doctrine applies not just to defendants but to the State as well).

Because the State has not refuted, mentioned, or distinguished the extensive discussion of the law and the facts set out in Mr. Robinson's Initial Brief, Mr. Robinson rests on his unrefuted arguments.

984 (5th Cir. 1981) ("Moreover, appellee has not mentioned exhaustion in his brief or argument before the court. We conclude, therefore, that appellee has waived the defense of lack of exhaustion"); *Gordon v. Nagle*, 2 F. 3d 385, 386 n.3 (11th Cir. 1993) (failure to raise defense in a timely manner "implicitly waiv[es] that defense"); *Atkins v. Attorney Gen. Of Alabama*, 932 F. 2d 1430 (11th Cir. 1991) (governmental entity may wave an issue "either expressly or impliedly" by failing to raise a defense in the district court or on appeal).

ARGUMENT III

VARIOUS CLAIMS RAISED BY MR. ROBINSON MUST BE RAISED HEREIN IN ORDER TO PRESERVE THEM AND TO PROTECT MR. ROBINSON'S RIGHTS.

Mr. Robinson rests on his Initial Brief in reply to the State's arguments. He does note one matter, however. Citing *Shere v. State*, 742 So. 2d 215, 218 n.6 (Fla. 1999), the State argues that Mr. Sireci's allegations in this argument are insufficiently briefed or not ripe for consideration (Answer Brief at 67 *et. seq.*). However, the State overlooks that, in *Sireci v. State*, 773 So. 2d 34 at n.14 (Fla. 2000), decided after *Shere*, this Court indicated that capital defendants can preserve certain oft-raised issues in capital cases in the manner as Mr. Robinson has. Thus, the State's complaints are meritless and its reliance on *Shere* misplaced.

CONCLUSION

Based on the foregoing arguments and those in his Initial Brief, Mr. Robinson requests that the Court reverse the lower court and grant an evidentiary hearing, and/or grant his request for a new trial and/or sentencing proceeding before a duly-empaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief was furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida, 32118, this 16th day of August, 2004.

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CERTIFICATE OF TYPE SIZE AND FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font, a font that is not proportionately spaced.

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